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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-1534

SALLY WILLIAMS,

Petitioner,

vs.

BOARD OF EDUCATION OF UNION TOWNSHIP, UNION COUNTY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

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No.

SALLY WILLIAMS,

Petitioner,

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BOARD OF EDUCATION OF UNION TOWNSHIP, UNION COUNTY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

Sally Williams hereby petitions for a writ of certiorari to review the judgment of the Appellate Division of the Superior Court of New Jersey.

Opinions Below

The opinion of the Appellate Division of the Superior Court has not been officially reported and is set forth in Appendix A (1a). This judgment affirmed peti-

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tioner's dismissal from employment with the school district of Union Township, Union County, New Jersey, directed by the Commissioner of Education of the State of New Jersey, which was affirmed by the New Jersey State Board of Education. The Commissioner's Decision is dated October 10, 1973 and is set forth in Appendix C (10a). The State Board's Decision is dated February 6, 1974 and is set forth in Appendix D (52a).

The order of the Supreme Court of the State of New Jersey denying certification to review the decision of the Appellate Division of the Superior Court of New Jersey was rendered without opinion on March 11, 1975, is reported at 67 N. J. 102, 335 A. 2d 54 and is set forth at Appendix B (9a).

Jurisdiction

The order of the Supreme Court of New Jersey denying certification (that is, refusing to entertain an appeal from the final decision of the Appellate Division of the Superior Court) was entered on March 11, 1975. The opinion of the Appellate Division of the Superior Court of New Jersey is dated January 15, 1975. The jurisdiction of this court is invoked under 28 U.S.C. § 1257 (3).

Questions Presented

1. Whether a person charged with misconduct in a hearing before a governmental agency may be penalized without an opportunity to confront and cross-examine adverse witnesses where the decision of the governmental agency will turn on questions of fact?

2. Whether under the First, Sixth and Fourteenth Amendments a person is not entitled to confront accusatory witnesses?

3. Whether under the First, Sixth and Fourteenth Amendments an administrative agency or court may accept as an irrebuttable presumption the notion that certain classes of mentally disturbed persons are incapable of relating inaccurate or untrue facts?

Constitutional and Statutory Provisions Involved

The applicable United States constitutional provisions are the First, Sixth and Fourteenth Amendments and the First through the Ninth Amendments.

N.J.S.A. 52:14B-10, which is set forth on page 7 of this brief.

Concise Statement

Petitioner, Sally Williams, has been teaching in the Union Township, Union County, New Jersey school district as a teacher of the handicapped for some 16 years. These children are classified as trainable but noneducable children. These are children with severe mental and physiological handicaps who cannot benefit from any type of formal education but may be potentially capable of acquiring some kind of training, so that they may be able to help themselves in an emergency (N.J.S.A. 18A:46-9). Thus, for example, these children may learn to recognize the configuration of the word "Exit" or the implications of a red traffic signal, but not much more.

As a result of an arrangement with a sister school district (Roselle, New Jersey) the Union Township School District had taken over the training of a group of children from 14 through 21, and it was a class of 10 of these children that were being taught by petitioner.

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In 1971, charges were preferred against petitioner by the school district with respect to alleged misconduct; in the main, relating to allegedly striking two students, intimidating and threatening pupils in her classroom and a number of acts of minor insubordination. Petitioner concedes that the school authorities in New Jersey have taken a dim view of teachers asserting corporeal punishment against their students, but, in the instant case, the findings of dismissal were predicated upon a totally invalid and completely unsubstantiated theory of child psychology which alleges that handicapped children are incapable of fabricating any kind of story and that complete reliance can be placed upon any matter which such children relate, even when transmitted through third persons.

It was agreed in this case that the children were incompetent witnesses and that they could not be called upon to testify directly. However, as a result of the recital of their version of events by other persons, in the main their parents, reliance was placed upon these stories and an ultimate penalty of dismissal from petitioner's long time employment was directed. It must be stated, although the Appellate Division's opinion does not discuss the matter, both the recommendation of the Hearing Officer appointed by the Commissioner of Education of New Jersey and the Commissioner's opinion are based on the erroneous assumption that notwithstanding petitioner's timely objections to the receipt of this testimony, there was some kind of tacit agreement that it could be received. The transcript will demonstrate beyond the peradventure of a doubt that petitioner's counsel objected instantly to the receipt of such testimony, although commenting on the fact that he was certainly not anxious to have the children exposed to the rigors of an adversary proceeding. At all times thereafter, when witnesses related stories by the children, objection was taken, and the

Hearing Officer noted the standing objection to the receipt of this testimony. Somehow or the other appellant's recognition of the difficulties that would be involved in requiring these unfortunate youngsters to testify was translated into a consent to the receipt of the testimony. At no time, however, did petitioner consent to the receipt of such testimony. If this testimony had been excluded there could not have been any finding of significant misconduct by petitioner or that her dismissal would not have been directed. Ultimately, the Appellate Division accepted the same theory of child psychology authorized by the Commissioner of Education in accepting double and triple hearsay testimony upon the notion:

> ". . . Indeed, the Director of Student Personnel Services, in describing the pupils in this class, stated that although these pupils are trainable they cannot think abstractly and tell deliberate lies because of their inability to fabricate them." (6a)

One need not go into the literature of abnormal child psychology to realize the totally unreliable nature of this conclusion, since there was intrinsic evidence of an undeniable nature in the case itself to demonstrate that these children, like their nondisabled counterparts, are possessed of the most lively imagination and can fantasize as freely as the most gifted writer of fiction. One of the children, if her mother's testimony is believable, related that petitioner had pushed the child, pulled her hair, struck her in the face many times, pushed the children struck other children, threw them out of the classroom and had had C.F. stand in a corner for days on end. Obviously, neither her mother nor any of the school authorities had given any credence to these stories and had realized that they were simply the products of an overlively imagination on the part of C.F. herself, as well

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as the uncritical repetition of unreliable matters and gossip by the other children involved. The administrators, who paid no attention to these stories, and, obviously, discounted them, nevertheless inconsistently postulated the theory these handicapped children were incapable of factual distortions. It is petitioner's contention that the acceptance of this presumption played a material and inextricable part in the determination to dismiss her and constituted an unconstitutional deprivation of her rights.

The Commissioner of Education determined that on the basis of the charges filed against petitioner and found to be true, based in large measure on the acceptance of the hearsay stories related by the children and the presumption that they were incapable of fabrication, that petitioner had been guilty of serious misconduct in striking and intimidating the children. That decision was upheld by the State Board of Education without opinion and concurred in by the Appellate Division of the Superior Court.

A Petition for Certification was filed with the New Jersey Supreme Court and certification was denied. The Supreme Court by refusing certification thus left standing the ruling of the Appellate Division without reviewing or hearing oral argument on the case. The jurisdiction of this Court to review the case on a Petition for Certiorari rests on 28 U.S.C. §1257 (3).

REASONS FOR GRANTING THE WRIT

POINT I

Petitioner's dismissal on the basis of an irrebutable presumption and the invalid acceptance of nonconfronted testimony violated her Fifth, Sixth and Fourteenth Amendment rights.

It is a common place that an administrative hearing is subject to the same requirements of fair trial and due process as any court proceeding. In the instant case, the main body of charges, and certainly the major ones, dealt with allegations that petitioner conducted herself highly improperly with a number of her students, striking them and instilling in them fear and emotional conflict, so that they were unable to benefit from the training which she was supposed to impart. The New Jersey Administrative Procedure Act, 52:14B-10 provides as follows:

> "In contested cases:
>
> (a) The parties shall not be bound by rules of evidence whether statutory, common law, or adopted by the Rules of Court. All relevant evidence admissible, except as otherwise provided herein. The presiding officer may in his discretion exclude any evidence if he finds that its probative value is substantially outweighed by the risk that its admission will either (i) necessitate undue consumption of time or (ii) create substantial danger of undue prejudice or confusion. The presiding officer shall give effect to the rules of privilege recognized by law. Every party shall have the right to present his case or defense by oral and documentary evidence, to submit rebuttal evidence and to conduct such cross-examination as may be required for a full and true disclosure of the facts."

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The statute simply recognizes basic elementary and constitutional concepts of fair play and due process. As to the necessity of the right of confrontation and cross-examination in an administrative proceeding, *Goldberg* v. *Kelly*, 397 U. S. 254 (1970) and *Greene* v. *McElroy*, 360 U. S. 474 (1959) are definitive. The New Jersey authorities, mindful of the learning of the aforesaid cases, have reiterated this basic requirement. In *Tibbs* v. *Board of Education of Franklin Township*, 59 N. J. 506, 284 A. 2d 179 (1971) affirming the determination of the Appellate Division, 114 N. J. Super. 287, 276 A. 2d 165 (1971) the minimal due process requirements in an administrative proceeding were exhaustively analyzed and delineated. In the *Tibbs* case, Judge Kolovsky, after citing *Goldberg* and *Greene, supra,* stated:

> "In my view, due process also requires that there be added to these minimal rights the right to demand that any such witness appear in person to answer questions. If the witness does not do so, his statement should not and may not be considered or relied on by the board." 276 A. 2d 172

What we have here is reliance upon a most mischievous theory of abnormal child psychology accepted as a conclusive presumption without any real testimony upon which to base this rather revolutionary new rule of evidence. The Court below, as well as the administrative authorities thoroughly ignored *Wigmore's* warnings about such procedure:

> "It is obvious that the recognition of such a rule is an extreme step to take. It amounts almost to an abdication of the Court's judicial functions (post, § 1353). To forego investigation into the existence of a fact because a certain officer not hav-

> ing judicial powers or opportunities of investigation has declared it to exist or not to exist, and to accept his statement as conclusive and indisputable, is in effect to refuse to exercise, as regards that specific fact, that function of the investigation and final determination of disputes which is the peculiar attribute of the Judiciary as distinguished from the Executive and the Legislature. That the Court may, if it chooses, in dealing with evidence, take such a step seems clear,—though whether the Legislature may constitutionally oblige it to do so is another question (post, § 1353). But obviously it is a step which will not be taken except when clearly indispensable as the best practical method of settling disputes and giving stability to the interests of all concerned.
>
> For this reason, it would seem, 'a priori', that such a rule does become the most practical solution in two kinds of situations, and in two only:" 4 Wigmore on Evidence, § 1348 (Third Edition—1940).

The two exceptions relate to prior trials and where there was a danger of lost documentation—neither of which apply here. It is, of course, noteworthy that no authority on child behavior was cited for this revolutionary doctrine by the court or the Commissioner of Education.

To permit dispositive implications to be drawn on the basis of hearsay and incompetent evidence certainly violates the most elementary notion of due process and fair trial, but to form a conclusive presumption on the basis of the most dubious of psychological theories must be shocking to the conscience. To wreck a career of a teacher

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of 16 years' standing without a fair opportunity for confrontation and cross-examination of the testimony of witnesses uttered outside the forum, who could not have testified in the forum is staggering. Especially is this so where it has been pointed out there was internal evidence to demonstrate the very invalidity of this incredible theory. *A fortiori* where the school authorities themselves demonstrate that they give scant credence to the very same kind of recitation by the very students involved when it was obvious that that recitation was completely fabricated, or, perhaps more humanely, the product of an overlively and fanciful imagination.

The disposition below clearly flies in the face of *Goss* v. *Lopez,* decided by this Honorable Court on January 22, 1975. —— US ——, 42 L Ed 2d 725, 85 S Ct —— [No. 73-898]. As Mr. Justice White stated therein:

> "[5, 6] Accordingly, a state employee who under state law, or rules promulgated by state officials, has a legitimate claim of entitlement to continued employment absent sufficient cause for discharge may demand the procedural protections of due process. Connell v. Higginbotham, 403 US 207, 29 L Ed 2d 418, 91 S Ct 1772 (1971); Wieman v. Updegraff, 344 US 183, 191-192, 97 L Ed 216, 73 S Ct 215 (1952); Arnett v. Kennedy, 416 US 134, 40 L Ed 2d 15, 94 S Ct 1633 (1974), 164 (Powell, J., concurring); 171 (White, J., concurring and dissenting). So may welfare recipients who have statutory rights to welfare as long as they maintain the specified qualifications. Goldberg v. Kelly, 397 US 254, 25 L Ed 2d 287, 90 S Ct 1011 (1970). Morrissey v. Brewer, 408 US 471, 33 L Ed 2d 484, 92 S Ct 2593 (1972), applied the limitations of the Due Process Clause to governmental de-

> cisions to revoke parole, although a parolee has no constitutional right to that status. In like vein was Wolff v. McDonnell, 418 US 539, 41 L Ed 935, 94 S Ct 2963 (1974), where the procedural protections of the Due Process Clause were triggered by official cancellation of a prisoner's good-time credits accumulated under state law, although those benefits were not mandated by the Constitution." (at page 733).

The procedure herein involved with its invalid utilization of a dubious rule of evidence is discussed and criticized by Professor Laurence H. Tribe in his recent article "Structural Due Process" in 10 Harvard Civil Rights —Civil Liberties Law Review No. 2 (Spring 1975). Especially relevant are the collection of cases therein contained (page 285, Note 49) on irrebuttable presumption decisions, including *Bell* v. *Burson,* 402 U. S. 535 (1971); *Stanley* v. *Illinois,* 405 U. S. 645 (1972); *Vlandis* v. *Kline,* 412 U. S. 441 (1973); *U. S. Department of Agriculture* v. *Murry,* 413 U. S. 508 (1973); *Cleveland Board of Education* v. *LaFleur,* 414 U. S. 632 (1974), and see law review articles also cited in the foregoing article.

We submit that to permit the petitioner to be discharged in this context is to elevate the most dubious psychological theory into an irrebuttable presumption of law and to deny petitioner all of her constitutionally guaranteed rights to due process and a fair trial.

CONCLUSION

For the reasons set forth above the petition for certiorari should be granted.

Respectfully submitted,

EMIL OXFELD
Attorney for Petitioner

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APPENDIX A

Opinion of the Superior Court of New Jersey, Appellate Division

(Filed—January 15, 1975)

SALLY WILLIAMS

Respondent-Appellant,

vs.

BOARD OF EDUCATION OF UNION TOWNSHIP, UNION COUNTY,

Petitioner-Appellee.

Argued December 10, 1974—Decided Jan 15 1975

Before Judges Carton, Crane and Kole.

On appeal from New Jersey State Board of Education.

Mr. Emil Oxfeld argued the cause for appellant (Messrs. Rothbard, Harris & Oxfeld, attorneys).

Mr. Howard Schwartz argued the cause for respondent, Board of Education (Messrs. Simone and Schwartz, attorneys).

Mr. William F. Hyland, Attorney General of New Jersey, attorney for respondent New Jersey State Board of Education, filed a statement in lieu of brief; Ms. Mary Ann Burgess, Deputy Attorney General, of counsel.

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Appendix A

The opinion of the court was delivered by

CARTON, P.J.A.D.

Sally Williams, a teacher under tenure, appeals from a determination of the New Jersey State Board of Education affirming the decision of the Commissioner of Education in dismissing her from her position as a teacher of special education. The Commissioner sustained eight of fourteen charges certified to him by the Board of Education of Union Township.

The Commissioner found that the entire record disclosed.

> * * * a pattern of conduct * * * which is unprofessional and constitutes unbecoming conduct for a teacher. Specifically [the teacher] has been found to have committed corporal punishment against two of her pupils; instilled fear in her pupils, and has been insubordinate to her supervisor. Therefore [the teacher] must forfeit the tenure protection that the statutes afford teaching staff members who have complied with their minimum requirements.

The argument advanced by appellant for reversal is that the Commissioner's determination was based on "totally incompetent evidence." The thesis is that, because some of the charges against the teacher were partially supported by testimony of parents and other teachers, which testimony included statements made to them by pupils in her class, the determination cannot stand.

The children taught by appellant comprise a special class of mentally retarded children who cannot be classified as educable but who are considered trainable. Their

classification is specified by statute. N.J.S.A. 18A:46-1 defines a handicapped child as

> any child who is mentally retarded, visually handicapped, auditorily handicapped, communication handicapped, neurologically or perceptually impaired, orthopedically handicapped, chronically ill, emotionally disturbed, socially maladjusted or multiply handicapped.

N.J.S.A. 18A:46-8 requires that all handicapped children be classified under one of the above-named categories. A sub-category of mentally retarded children is that of "trainable mentally retarded children," defined in N.J.S.A. 18A:46-9 as

> so severely retarded that they cannot be classified as educable but are, notwithstanding, potentially capable of self-help, of communicating satisfactorily, of participating in groups, of directing their behavior so as not to be dangerous to themselves or others and of achieving with training some degree of personal independence and social and economic usefulness within sheltered environments.

The class being taught by appellant consisted of a group of about ten pupils, fourteen years of age and older. These pupils were described as having an I.Q. level ranging from 20 to 50. The evidence indicated that the I.Q. levels of some of the pupils in appellant's class were so low that they could not be measured.

The Commissioner's decision appears to have been based upon the cumulative instances of unfavorable conduct. *Cf. Redcay* v. *State Board of Education,* 130 N. J. L. 369, 371 (Sup. Ct. 1943), aff'd 131 N. J. L. 326 (E. & A. 1944).

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Appendix A

Five of the eight charges sustained were unaffected by the challenged evidence. Charges 4 and 11 charge the teacher with leaving her classroom unsupervised and without permission. Charges 6 and 7 charge insubordination toward Frank A. Moretti, Director of Student Personnel Services for appellee Board, in that the teacher entered Moretti's office, threatened him and made derogatory remarks (Charge 6) and refused to meet with parents in Moretti's presence (Charge 7). Charge number 10 charged the teacher with making a remark to the class that one of the pupils should have stayed home. With respect to Charges 4 and 11, Director Moretti testified that all teachers, especially those of special education, were never permitted to leave their classes unattended. Each of these five charges was supported by substantial credible evidence.

In their totality, and without regard to the three charges on which the evidence was challenged, the proof was sufficient to justify the determination of the Commissioner. Therefore the determination appealed from must be affirmed. See *Atkinson* v. *Parsekian,* 37 N. J. 143, 149 (1962); *In re Tenure Hearing of Grossman,* 127 N. J. Super. 13, 22-23 (App. Div. 1974), certif. den. 65 N. J. 292 (1974).

The evidence which appellant criticizes on this appeal as being inadmissible relates to episodes which were the subject of the first, second and eighth charges. In Charge 1 appellant was charged with striking a pupil named Charles Moore. In Charge 2 she was charged with intimidating and threatening pupils in her classroom. In Charge 8 she was charged with striking a pupil named Renee Bojorquez.

The general character of the evidence objected to is similar as to each of these charges. Reference to the evi-

dence on the first charge will be sufficient to illustrate its nature.

Charles Moore's mother testified that in May 1971 Charles told her that appellant had hit him. She said he had marks on his body. The next day Mrs. Moore asked the children on the school bus who was hitting her child. Three or four of the pupils stated it was the teacher.

The physical education teacher testified that one afternoon in the Spring of 1971 he noticed Charles crying in the boys' gym. When he asked Charles what was wrong the boy did not reply, but another pupil said the teacher struck Charles. Three other teachers and the Director of Student Personnel Services gave testimony concerning an incident in which they noticed Charles crying but could get no response from him. Two students told one of the teachers named Hassard that the teacher struck Charles. When Charles motioned with his hands to his body, Hassard raised the boy's shirt and observed a discoloration of the skin under the armpit.

Immediately after the incident the Director of Student Personnel Services spoke to appellant but she denied having struck the boy. She also denied other allegations when questioned by Charles' parents the next day. The parents of two other pupils of the class also testified that their children had mentioned this episode several months after it occurred, one of them saying that appellant had hit Charles hard.

Appellant testified that Charles is unable to talk, and claimed that she asked Charles who hit him, telling him to point to the person who did so, but Charles did not respond. Another teacher testified that Charles was able to communicate his needs.

Appendix A

It seems agreed by the parties and accepted as true by the Commissioner that none of these pupils was able to give competent testimony at the hearing. It does not necessarily follow that no consideration whatsoever can be given to their communications. The evidence at the hearing indicated that the pupils in this class were able to communicate, at least to some degree, their feelings and reactions. Indeed, the Director of Student Personnel Services, in describing the pupils in this class, stated that although these pupils are trainable they cannot think abstractly and tell deliberate lies because of their inability to fabricate them.

An analysis of this evidence indicates that it falls into three categories. The first includes the statements made by Charles to his mother and the statements made by other students to the gym teachers. These were made within a reasonable proximity to the event described, the alleged striking of Charles by appellant. As such they are admissible as exceptions to the hearsay rule as excited utterances under *Evid. R.* 63(4). That rule provides:

> A statement is admissible if it was made (a) while the declarant was perceiving an event or condition which the statement narrates, describes or explains, or (b) while the declarant was under the stress or nervous excitement caused by such perception, in reasonable proximity to the event and wtihout opportunity to deliberate or fabricate.

In determining whether evidence of this character should be admitted, the crucial question is always whether the circumstances negate the possibility that the declarant fabricated or contrived a misrepresentation. The temporal proximity of these statements to the event de-

scribed might itself be sufficient to conclude that the evidence was trustworthy. Coupled with the testimony that these declarants, trainable children, lacked the mental capacity either to fabricate an untruth or to conspire to tell the same untruth, they are clearly admissible. The circumstance that several sets of parents and four teachers and administrators testified to similar statements by the children lends further support to the trustworthiness of this evidence.

Nor is it significant that the declarants themselves might be incompetent to be called as witnesses. See *State* v. *Simmons,* 52 N. J. 538, 542 (1968), where the older brother of a mentally deficient 16-year-old deaf mute rape victim was permitted to relate her actions and gestures in identifying her assailant.

The second category of evidence includes the testimony of the two gym teachers concerning their observations of Charles shortly after the alleged striking. One teacher reported that he had observed Charles crying. The other said that in response to Charles' gestures he raised the boy's shirt and discovered a discoloration of the skin under the armpit. This is circumstantial evidence relevant to the charge and based on the personal knowledge of the witnesses. As such it is clearly admissible.

The third category includes the statements made by unnamed students on Charles' school bus to Charles' mother. This constitutes hearsay evidence which would not ordinarily be admissible in a court of law. However, it is well-settled that administrative agencies may, under some circumstances, receive hearsay evidence in their hearings. See *State* v. *Weston,* 60 N. J. 36, 51 (1952), where it was held:

Appendix A

> • • • Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantive rights of a party, there must be a residuum of legal and competent evidence in the record to support it. • • •

Contrary to appellant's contention, the record contains a substantial residuum of competent evidence to support the charges. The excited utterances of the children and the circumstantial evidence of the gym teachers constitute legally competent and admissible evidence. In these circumstances reliance on the hearsay evidence of the children on the bus as corroborations of competent proof was proper.

Viewing the evidence in the record in its entirety, we conclude that it amply justifies the determination of the Board in sustaining the Commissioner's decision as to all charges.

APPENDIX B

Order of the Supreme Court of New Jersey Denying Certification

(Filed—March 11, 1975)

SUPREME COURT OF NEW JERSEY
C-378 September Term 1974

IN THE MATTER OF THE TENURE HEARING OF SALLY WILLIAMS, SCHOOL DISTRICT OF UNION TOWNSHIP, UNION COUNTY.

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Mark A. Sullivan, Presiding Justice, at Trenton, this 11th day of March, 1975.

FLORENCE R. PESKE
Clerk

APPENDIX C

Decision of the Commissioner of Education

IN THE MATTER OF THE TENURE HEARING OF SALLY WILLIAMS, SCHOOL DISTRICT OF UNION TOWNSHIP, UNION COUNTY.

October 10, 1973

For the Complainant Board of Education, Simone and Schwartz (Howard Schwartz, Esq., of Counsel)

For the Respondent, Rothbard, Harris and Oxfeld (Emil Oxfeld, Esq., of Counsel)

Written charges against respondent, a teacher with a tenure status, including corporal punishment, conduct unbecoming a teacher, intimidating and threatening pupils, using profanity and other charges related to respondent's performance of her teaching duties, were certified to the Commissioner by the Board of Education of Union Township, hereinafter "Board," by resolution dated September 1, 1971. A copy of the charges and the resolution were mailed to respondent by the Board of September 2, 1971. The complainant Board certified that the charges would be sufficient, if true in fact, to warrant dismissal or reduction in salary.

A hearing on the charges was conducted at the office of the Union County Superintendent of Schools, Westfield,

Appendix C

March 28, 29, May 9, 11, July 14, September 20, and October 24, 1972, by a hearing examiner appointed by the Commissioner. The report of the hearing examiner follows:

The Superintendent of Schools prepared twelve separate charges against respondent which will be discussed *seriatim*. He prepared two supplemental charges of insubordination which were later certified to the Commission by resolution of the Board on December 21, 1971, and mailed to respondent on December 22, 1971. To avoid confusion these additional charges will be numbered No. 13 and No. 14.

At the beginning of the hearing, the Board offered a Motion to strike the defenses and pleadings of respondent for failure to answer interrogatories as agreed between counsel at the conference held November 22, 1971. Respondent argued that the Board also, had not complied wholly with the agreement to answer interrogatories; that she did answer some of them and that most of information requested by the interrogatories is known or should be known by the Board (1 Tr. 3-14).

Counsel further agreed that, if necessary, they would attend another conference with the hearing examiner for the purpose of having certain interrogatories examined and answered. Moreover, no such conference was requested by either party; therefore, the hearing examiner recommends that the Motion to strike the defenses and pleadings of respondent be denied (1 Tr. 13-14).

Most of the charges by the Board arise as a result of alleged incidents between respondent and her "trainable" pupils, their parents and resultant confrontations with her supervisors. The other charges against respondent

result from a psychiatric examination ordered by the Board which was given at the New Jersey State Diagnostic Center at Menlo Park on August 5, 1971, and her later refusal to submit to another medical examination.

None of the trainable pupils testified. The hearing examiner finds that a description of "trainable" pupils is necessary to show why no such testimony was agreed and to explain why it was necessary to rely on testimony offered by parents, teachers and others involved with the trainable pupils.

Handicapped children are defined in N.J.S.A. 18A:46-1 as follows:

> "As used in this chapter a handicapped child shall mean and include any child who is mentally retarded, visually handicapped, auditorily handicapped, communication handicapped, neurologically or perceptually impaired, orthopedically handicapped, chronically ill, emotionally disturbed, socially maladjusted or multiply handicapped."

N.J.S.A. 18A:46-8 requires that all handicapped children are to be identified, examined or classified

> "* * * under one of the following categories: mentally retarded, visually handicapped, auditorily handicapped, communication handicapped, neurologically or perceptually impaired, orthopedically handicapped, chronically ill, emotionally disturbed, socially maladjusted or multiply handicapped."

A sub-category of mentally retarded pupils is defined in N.J.S.A. 18A:46-9 as follows:

Appendix C

> "* * *. Trainable mentally retarded children, who are so severely retarded that they cannot be classified as educable but are, notwithstanding, potentially capable of self-help, of communicating satisfactorily, or participating in groups, of directing their behavior so as not to be dangerous to themselves or others and of achieving with training some degree of personal independence and social and economic usefulness within sheltered environment."

The particular trainable pupils in the class discussed herein were fourteen years of age and older and their physical and mental capabilities as described by the director of student personnel services, are summarized as follows (2 Tr. 260-269):

The trainable category of pupils is identified by an I.Q. level of approximately twenty to fifty. The I.Q. levels of some of the pupils in respondent's class were so low that they could not be measured. Trainable pupils need a great deal of personal assistance. For example, some of them never learn to tie their shoelaces or go unaided to the boys' lavatory or the girls' lavatory. The director testified further that trainable pupils cannot think abstractly and cannot make up stories which are lies, because they are unable to fabricate such stories (2 Tr. 263).

An example of the abilities of these particular trainable pupils was given by the professional working relationship between respondent and one of her colleagues who ran the "shop" program. The shop teacher, working with the pupils in putting together a booklet of five or ten pages, would coordinate his lesson plans with respondent's, so that respondent could help the pupils grasp

the concept of a booklet of five or ten pages (2 Tr. 260-269).

Pupils are also taught "survival language," which can best be described as the recognition of key words, such as: exit signs, danger, stop, go, months of the year and holidays. These pupils are also taught to know their own names, and if able to write, to attempt to write them. Even though pupil is unable to read the word "exit," the pupils should be taught cognition of the letters "e-x-i-t," so that he/she could learn how to leave a building (2 Tr. 264).

For these reasons and because of the description and examples of the trainable pupils as reported herein, there was tacit agreement at the hearing that it would be unwise to attempt to elicit pupil testimony.

This understanding was also addressed in respondent's Brief as follows:

> "* * * As a result of the fact that many of the charges deal with alleged misconduct against the children and as a result of the fact that the Board chose not to call the children in the first instance to testify, we are forced to rely upon a good deal of hearsay evidence, in that the testimony consisted of statements allegedly made by the children to third persons, be they parents or other teachers.
>
> "On behalf of Mrs. Williams, the writer franky, as stated over and over again in the hearings, was reluctant to subpoena any of the children because of his serious doubts as to (1) their competency as witnesses; and (2) the total undesirability, if not inhumanity, of attempting to subject these chil-

dren to an adversary proceeding and examination, cross-examination, and the like.

"We must, therefore, keep in mind that we are dealing with testimony which, if offered directly, might not have been competent, for it would certainly be most difficult to demonstrate that any of these children understood the nature of an oath or were mentally qualified to give testimony, and the trier of fact, in this case the hearing officer, has not made a preliminary decision as to whether any of these children would have been competent witnesses. (See *Loblondo* v. *Allan*, 132 N. J. L. 437, 40 A. 2d 810 (1945)). * * *" (Respondent's Brief, at pp. 2, 3)

The Board's program for its trainable pupils included a joint arrangement with the Board of Education of Roselle Public Schools. The joint arrangement was that Roselle would teach the younger trainables and that the fourteen-year-old and older trainables would be taught in the Union School System (2 Tr. 262). This arrangement and the resultant correspondence between the schools of Union and Roselle explain the use of later testimony from teaching staff members employed by the Board of Education of Roselle (2 Tr. 155, 166). Additionally, the trainable program in Union Township was offered to the parents of trainable children who lived in school districts other than Roselle, and some of those parents testified (1 Tr. 60; 2 Tr. 261).

CHARGE No. 1

"On or about May 27, 1971, you did intentionally, and wrongfully assault and strike a student named

> * * * (C.M.) inflicting corporal punishment in violation of law, causing injury on the infant pupil."

C.M.'s mother testified that respondent had slapped her child and that C.M. had complained off and on that "she (respondent) hit me." C.M. was then eighteen or nineteen years old (1 Tr. 134-139). Testimony by C.M.'s mother and other teacher witnesses was that, although C.M. could hardly talk at all. he could make his wants and needs known to them (2 Tr. 177, 237). His mother specifically testified that C.M. could say "she," although he could not say respondent's name. Therefore, respondent's testimony that C.M. could not talk at all, is refuted by the testimony of his mother and some of his teachers (7 Tr. 809, 811).

C.M.'s mother testified that she visited the bus which C.M. customarily rode to school and qustioned the pupils about C.M.'s complaint that he had been struck. She testified that she did this because she thought that other pupils had been hitting C.M. (1 Tr. 93). She identified three pupils on the bus by name and indicated that they, among others, had also named respondent as the person who had struck C.M. (1 Tr. 96, 136).

The circumstances leading to this charge are that on the day in question, C.M. was dismissed with the other pupils by respondent from her classroom, to go to their next class in the gym. A physical education teacher testified that he found C.M. shortly thereafter, crying near the gym door and was told by one of the pupils that "the teacher" had struck C.M (2 Tr. 123). Two other physical education teachers testified that they too had observed C.M. crying and sobbing and that several pupils told each of them that respondent had struck C.M. (2 Tr. 226-234).

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Both a physical education teacher and a shop teacher testified that they had raised C.M.'s shirt and observed that C.M. had marks of skin discoloration on his body (2 Tr. 229-230, 235).

Two parents also testified that their own children had told them that respondent had been hitting C.M. (2 Tr. 209, 214-215; 4 Tr. 500-501).

Repondent denies ever striking C.M. Her version of the alleged incident is that she dismissed her pupils to go to gym, and nothing untoward had happened in her classroom. She found C.M. shortly thereafter, in the director of special services' office where she had been summoned. Respondent testified as follows:

> "* * * A. When I got here I saw * * * (C.M.) sitting there, and I said to him hell, man; what are you doing here, and he was crying. I said now who hit you? I said have you been in a fight, and I put my arms around him and he was still sobbing. So at that time Mr. Moretti opened the door and told me to bring * * * (C.M.) in. So * * * (C.M.) and I went in, and he said to me, he says Sally, he says you have the most peculiar way of getting out of things I ever saw in my life. I said to him what are you talking about. Are you accusing me of striking * * * (C.M.)? He said yes. You hit him. He said you hit him. I said I hit him? I said I don't know anything about it.
>
> "Q. Did you say anything to * * * (C.M.)?
>
> "A. So I said to him * * * (C.M.), I said * * * (C.M.) who hit you. So * * * (C.M.) can't talk. I said point to the person that hit you. Take me to the person and point. So he just stood there. So

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I went back to my classroom, and left * * * (C.M.) in Mr. Moretti's office. * * *" (6 Tr. 676-677)

Respondent suggests that perhaps C.M. was struck by another pupil after he left her class and before he arrived in the gym. She testified further as follows:

"* * * Q. Mrs. Williams, why did you assume that he had been hit at all?

"A. He was crying. He just don't cry for nothing.

"Q. Well, why did you assume he had been hit?

"A. He had to be hit. Somebody hit him. He wouldn't just cry. Who wouldn't assume that? I would assume, and you would, too.

"Q. Because he was crying he was hit?

"A. Certainly.

"Q. Isn't it a fact that he cried from other things also?

"A. I never saw him cry for anything else. * * *" (7 Tr. 799)

She testified also that any teacher who stated that C.M. had reported being struck by his teacher "* * * would be lying because * * * (C.M.) can't talk." (7 Tr. 797)

Having observed the demeanor of the witnesses as they testified, the hearing examiner is convinced by the weight of credible evidence that respondent struck C.M. in her classroom as charged.

C.M. was struck as shown by the marks on his body, and respondent does not dispute the fact that he was struck. However, her supposition that he was struck after leaving her class and before entering the next, possibly by

another pupil, is totally unsupported by any facts or witnesses. The hearing examiner does not believe that these trainable children, who told several of their teachers that respondent struck C.M., could conspire to relate such identical stories. Nor does he believe that these pupils could have conspired to inform C.M.'s mother at the bus stop that respondent struck C.M. (2 Tr. 263). In addition, two parents, each having a pupil in rsepondent's class, testified that their children had told them that respondent struck C.M. (2 Tr. 209, 500).

The hearing examiner recommends, therefore, that the Commissioner determine that respondent struck C.M. as charged, in violation of the corporal punishment statute, N.J.S.A. 18:6-1, which reads in part as follows:

> "No person employed or engaged in a school or educational institution, whether public or private, shall inflict or cause to be inflicted corporal punishment upon a pupil attending such school or institution * * * ."

> CHARGE No. 2

> "Contrary to professional responsibility, you have frightened, and instilled fear, in pupils in your classroom. You have done this by intimidating and threatening the pupils. These pupils include * * * (L.M.) and * * * (C.M.)."

C.M.'s mother testified that C.M. did not want to go to school because he was being hit and that she thought other pupils were hitting him. She said he would not prepare for school in the morning and he tried to cry to show her he didn't want to go to school. It was his demonstrated fear of school that caused her to question

C.M.'s classmates on the school bus and later decide to confer with respondent about C.M. (1 Tr. 93-94, 99)

This testimony when coupled with the finding in Charge No. 1 is sufficient for the hearing examiner to conclude that C.M. was in fact afraid to attend school.

The parents of L.H. testified that their daughter, then seventeen, is orthopedically handicapped and mentally retarded. She has had several major operations to reshape her legs. She is now able to walk with difficulty, but she needs occasional help. They testified that she became reluctant to go to school, although she did attend regularly. (3 Tr. 385-389)

The director of special services for the Roselle Schools wrote to the director of special services of the Union Township Schools, to inform him concerning three complaints from Roselle parents about respondent's class in Union. The parents of C.M. and L.H. who reside in Roselle, requested their director to transfer their children from respondent's class. The other complaint was from a parent who said he found respondent asleep when he visited her class. This parent also complained that respondent had not taught his son the reading of signs as had been recommended by the Evaluation Center of Newark State College. (P-4)

C.F.'s mother testified that her daughter had been struck and had her hair pulled by respondent. She testified also that C.F. had witnessed C.M., L.H., and R.B. being struck by respondent. (4 Tr. 493-522) Her testimony was that C.F. told her that she had seen these children struck several times and that she, C.F., had been struck several times. She testified, also, that C.F. could not tie her sneakers for gym and that respondent refused to help

C.F. because she said that "* * * She was not a maid to these children * * * ." (4 Tr. 494)

She testified also as follows:

> "* * * * A. There were many times she would come home and she would tell me that, you know, Mrs. Williams either pushed her, or pulled her hair, smacked her in the face, and many times, with other children she would be sitting at the table eating supper, and she would start telling, you know what happened today, and then she'd hold her mouth, and I'd say well what happened, and she'd say I can't tell you because Mrs. Williams is going to kill me. And I'd leave her, because I know that she would tell me in a few minutes, anyhow, what happened, and she would tell me. Oh, I'll tell you, she says, you know what happened? Mrs. Williams pushed so and so, or hit so and so, or threw them out of class, or what have you. * * * (4 Tr. 496-497)
>
> "* * * A. Well, I know * * * (C.F.)—and there was another big incident as far as I'm concerned, with * * * (C.F.), that she had to stay in the corner for days on end, and Mrs. Williams had told * * * (C.F.) that she wasn't going to get out of the corner until she stepped bothering her every morning, can I get out of the corner; I will be good today? She told her when you stop asking me, and it got to a point when Mrs. Williams told * * * (C.F.) you will get out of the corner; I would like to see your mother, and at that time I had no way of coming in, and I didn't put much stock in it. I figured tomorrow she'll let her out of the corner,

tomorrow she'll let her out of the corner, and it got to a point where she didn't, so I contacted, again, Mr. Lupidas (sic), and he made an appointment. He said he would take me, and he would go with me, and he would discuss it. When we got there Mrs. Williams out and out refused to let Mr. Lupidas (sic) in on the conference. I was quite disturbed, because I had a feeling he should hear what I had to say, and I wanted him to know what she had to say. When I spoke to her at that time, I approached her in reference to, you know, handling the child, pushing her or hitting her, and she out and out told me * * * (C.F.) was a liar, and that all these children lie, and I told her that * * * (C.F.) does not lie. I can't account for anybody else, but I know that * * * (C.F.) does not lie.

"Q. How do you know that?

"A. Because even in the house, like asking her to do something a little off color, anything, you know if I tell her to answer the phone and tell her to say I'm not home she will not do it. I guess she just can't comprehend it. * * *" (4 Tr. 497-498)

Respondent denies the allegations, *ante,* and characterizes the pupils' statements to their parents as unrealistic. Respondent's Brief (at p. 17) indicated that the parents of severely handicapped children have great anxieties; and that C.F. had a "lively imagination" and her stories were "uncritically accepted" by her parent.

One parent identified respondent as an ideal teacher for her son, D.W. She said that D.W. never had any trouble with respondent and that he referred to her as his girlfriend. (6 Tr. 651-653)

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Although some of the testimony, *ante*, indicates additional instances of corporal punishment by respondent, it is supported only by the testimony of C.F.'s mother. Nor did the Board, in Charge No. 2, accuse respondent of corporal punishment as testified, *ante*. Therefore, there is no finding of corporal punishment with respect to Charge No. 2.

The hearing examiner finds, however, that the repetitious testimony of several parents, that their children feared respondent, adequately supports the charge. Although a substitute teacher witness testified that she believed respondent had a very good relationship with her pupils, and that they missed respondent when she was absent, the weight of the believable testimony is that several of the children were reluctant to go to respondent's class. (1 Tr. 79-80, 94-95; 2 Tr. 209, 386, 397; 4 Tr. 496-497)

The hearing examiner recommends that the Commissioner find respondent did in fact intimidate and instill fear in her pupils as related in Charge No. 2.

CHARGE No. 3

> "In or about May ( ), 1970, you used profanity and showed disrespect for a parent of a pupil. Specifically, you told Mrs. * * * (C.M.) that you did not have to take any shit and what the hell was wrong with the child."

C.M.'s mother testified that she met with respondent when C.M. began attending the Union Schools and respondent did not want C.M. in her class. She testified that respondent complained that she would not tolerate C.M.'s wetting in his pants and that she started using

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profanity and said "• • • She wasn't a damn chambermaid. She didn't know what the hell was wrong with him. She didn't have to take that shit." (1 Tr. 122, 90-91) She testified further that in May 1971, she met with respondent concerning the reports she had received of C.M. being struck and her conversation, *ante*, with respondent about C.M. a year earlier. At this meeting, she avers that respondent denied using any profanity at their meeting the year before. She then testified that "• • • after knowing what the teacher had said, and then she would stand to my face and say she didn't say it, I said well this is it. (C.M.) won't go there. • • •" (1 Tr. 95) She testified further that respondent said "• • • that for all she cared I could take • • • (C.M.) out of school, and keep him out, and I could go write to Trenton, go to Trenton about it." (1 Tr. 97) C.M.'s mother removed her son from the school for the remainder of the school year. (1 Tr. 144)

Respondent denies using profanity as charged, but admits meeting with C.M.'s mother and asserts that they discussed his personal problems in her class. Specifically, she testified that "• • • (C.M.) was sick, and masturbating himself to sleep, and urinating, and he never would ask to go to the lavatory. • • •" (6 Tr. 666) She testified also that:

> "• • • A. When he came to school he was wet. So, that is when I proceeded to question her, to ask her was he toilet trained, and she says yes. He was toilet trained. And I said well, why is it that he wets his clothes? Why is it that he masturbates like he does? So she says I don't know. He doesn't do it at home. And there was no argument. That is what it was. We just let the answer go. • • •"

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Although the hearing examiner notes that C.M.'s mother removed her son from school for what she believed to be good reason, neither her testimony, *ante,* nor the testimony of respondent was corroborated by other witnesses; therefore, the hearing examiner believes that respondent is entitled to the benefit of any doubt and he recommends that Charge No. 3 be dismissed.

CHARGE No. 4

> "On February 9, 1971, you left your room unattended without any teacher in control. On this occasion, you absented yourself for 10 minutes, thereby engaging in unbecoming conduct and violating law and Board policy."

Respondent does not deny that she was approximately ten minutes late to class; rather, she asserts that she had good and sufficient reason for not being in her classroom at the prescribed time.

In her Answer respondent stated that she had become ill in the classroom and vomited. She avers she then left the room long enough to go to the bathroom, clean herself and return. However, she also testified that because it was a rainy, snowy morning, she was delayed in traffic and late for school; and when she arrived, the director and the children were in her classroom. (6 Tr. 674)

Later, she testified that she became ill in the classroom "*after noon*" and left to clear herself and return. (6 Tr. 680) (*Emphasis supplied.*)

In her direct testimony, respondent replied as follows to her counsel's question:

> "• • • Q. Now Sally, you testified, in connection with the February 9, 1971 episode, that that was

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the occasion when you came late to the class. In your answer you said that that was an occasion when you became ill, in the clasroom. Do you remember which one it was, on February 9?

"A. Yes; I was ill. I didn't finish that statement.

"After I left Mr. Moretti's office this morning I got sick in class. That was after noon. I got sick, and I upchucked in class, and I went out to the teachers' room, which is next door. So when I got back to clean myself up, when I got back Mr. Moretti was in the classroom. He said where have you been. I said Mr. Moretti, I'm sick. I upchucked. He said if you're sick, you stay home. I says I didn't get sick home. I got sick here. • • •"

The Board did not specify which law respondent violated nor did it quote the Board policy requiring employees to report to work on time. Suffice it to say, however, that all teachers are properly required to report to work at their assigned time.

The hearing examiner finds that the credible testimony supports the charge. If she were in fact ill in the afternoon as she testified, then her testimony regarding her lateness to school in the morning is totally unsupportable. Respondent's answers are conflicting. The hearing examiner finds that respondent has no accurate recollection of the incident that permits a finding that the Board's charge is in error. He recommends, therefore, that the Commissioner determine Charge No. 4 to be true as set forth by the Board.

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CHARGES Nos. 5 and 6

> "On October 9, 1970, you left your classroom unattended and unsupervised, thereby engaging in unbecoming conduct and/violating law and Board/policy.
>
> "On October 9, 1970, you were insubordinate to your Director and you, in fact, threatened him by saying 'I'll get you.' You further failed to follow his direction that you immediately return to your classroom that you had left unsupervised, thereby engaging in unprofessional conduct, being insubordinate, and violating law and Board policy."

These charges are similar and will be considered together. Respondent denies leaving her classroom unsupervised and further denies threatening her director. She avers that she sent the boys to the boys' lavatory and the girls to the girls' lavatory and visited the director's office briefly during that time. She then returned to her classroom. She avers that this is the usual practice and that the children are not accompanied to the lavatory; rather, they go and return on their own.

She admits that the director ordered her to return to her classroom; in fact, she testified that he yelled at her to return (7 Tr. 824-829, 836).

The director testified as follows:

> "* * * It was after the second note was sent to her that I was on the phone talking with Dr. Caulfield (sic) and she burst into the office, visibly upset, and was speaking in a very loud voice. She seemed to be agitated to the point where she was pointing her finger at me and saying things like I

will get you, and made some derogatory remarks about my wife, and the way I was treating her, and I don't remember the language.

"And since I was on the phone, I just said to her in the tone of voice which I am speaking now, get back to your class, and I said that three or four or five or six times. And I eventually had to put the phone down, because Dr. Caufield (sic) and I were talking, and he said what's going on, and you could hear the activity, and I said I am sorry, but Mrs. Williams is here. I will have to call you later, and I put the phone down.

"And finally she backed off, and went back to class * * *." (2 Tr. 255-256)

Respondent testified that she visited the director's office and was able to determine that he was talking on the phone to Dr. Caulfield, an assistant superintendent of schools in the district. Her testimony is as follows:

"* * * A. He asked me what I wanted, and I asked him why he was picking on me. I said why is it that everything I do you send me little notes, and they are not nice notes. I said how J.B. made the same mistake that I made. I said now, you put J.B.'s attendance cards in his mail box. You sent mine back to me. Now, if you're going to correct one teacher, why don't you correct both? Now this is what I told him.

"Q. And what did he say to you?

"A. He told me to get back to my classroom. I didn't say anything. He said I better get back to my classroom. I told him stop yelling at me. I'm

not your wife, neither your children. I said that for a point.

"Q. All right; regardless of why, this is what you said to him. Now, did you at any time threaten him by saying I will get you?

"A. No, I didn't say that. I didn't tell him that I was going to get him. I told him that I was going to see that he would stop yelling at me and treating me like a dog, and walking all over me. He had to stop.

"Q. All right; did you eventually—did you go back to your classroom?

"A. I went back to my classroom.

"Q. What did you do about the children? How did you get them back?

"A. Three girls were in the outer office. When we got back there the boys came in later. There were no one in the classroom. (sic) * * *" (6 Tr. 673-674)

Dr. Caulfield, who was talking to the director on the telephone when respondent entered the director's office, testified as follows:

"* * * A. I called him. He answered the phone. We exchanged a few words. There was shouting in the background. I asked what it was. He said it's Mrs. Williams. I continued the conversation, attempted to; the shouting continued. I could hear him say go back to your classroom; go back to your classroom. It continued. It continued; he said I will have to call you back, and we terminated the conversation. * * *" (4 Tr. 523)

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Other testimony, related to the physical design of the building and the proximity of respondent's class to the lavatories and to the director's office, leads the hearing examiner to conclude that any lack of supervision by respondent in this instance was minimal. He ? ? ? ? that the conduct of pupils to and from the lavatories as described by respondent was a routine procedure, except for respondent's visit to the director's office as detailed, *ante*. Testimony of other teachers shows that pupils walk to other classrooms and lavatories unsupervised. One teacher said C.M. was able to make him understand that he wanted to go to the lavatory, and he permitted C.M. to go (2 Tr. 241-242).

The hearing examiner recommends, therefore, that Charge No. 5 be dismissed.

With regard to Charge No. 6, the hearing examiner is constrained to observe the time, place and manner of the discourse that took place between respondent and the director in his office.

The record shows that respondent was upset and angry after receiving a second note that day from the director, instructing her to correct a mistake on a report. It was at that point in time that she entered his office to "* * * tell him what I (she) had to tell him * * *." (7 Tr. 835) Respondent believed she was being harassed and treated differently from other teachers (7 Tr. 830-835). In the hearing examiner's judgment, the record does not show that respondent was being harassed and treated differently from other teachers.

CHARGE No. 7

> "On December 5, 1968, you were insubordinate and unprofessional in that you refused to have a con-

ference with a set of parents in the presence of your Director, Mr. Frank Moretti."

CHARGE No. 8

"In November, 1968, you did intentionally strike a pupil * * * (R.B.), thereby inflicting corporal punishment in violation of law."

These charges are related and will be discussed together. The insubordination charged in No. 7 arises out of the events charged in No. 8; therefore, Charge No. 8 will be discussed first.

Respondent denied striking R.B. and testified that J.E. a classmate, hit him. She testified that because of that incident she called the parents of both pupils and invited them in for a conference. She testified further that she had a successful conference with J.E.'s mother, and as a result of that conference, there were no more incidents of J.E. hitting R.B.

She testified also that when R.B.'s mother and father arrived, she noticed an air of hostility about them because they refused to shake her hand. She testified that R.B.'s mother told her that she had made a formal complaint to the director because respondent had hit her son. Respondent testified specifically as follows:

"* * * A. He was present, sitting right there. So, by them being so hostile when they entered the room, and when she said her child didn't lie, I didn't know what the whole thing was all about until she told me. Then, I asked Mr. Moretti would he please step out. I wanted to talk to the parents alone.

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"Q. What did Mr. Moretti say?

"A. Just give me a few minutes—Mr. Moretti said to me that he was not going any place. He was going to sit here, and hear and see what was going on, and what I was doing. So at that point I said there was no point of my continuing this conference. I said to Mr. and Mrs. * * * (B.) If you all come back another time, you will be in a much better frame of mind, and we can talk, but as it is now I don't see where we can accomplish anything. Mr. Moretti says get on with the conversation. You'e not going to have these people come back, all the way from wherever this—they came from, and you not have a conference with him—with them. I said to Mr. Moretti, I said the conference is yours. He says it is not mine. It is yours. I said Mr. Moretti, the conference is yours. The reason I said that it because he had given those people ammunition, no matter what I said wouldn't have made any difference, at all. There was no protection that he protected me from those people. Now, had I known that Mr. * * * (B.) had registered a complaint against me I would have been aware of what was going to happen.

"Q. Well, you said you had notified the (B.'s) to come to school.

"A. Come to school to see me as a parent, in a teacher's conference, just as I just wanted to talk to her about her child, and I just wanted to meet them. * * *" (6 Tr. 661-662)

R.B.'s father testified that his son told him respondent had slapped him because he couldn't tie his shoes (1 Tr. 64). The father corrobrated respondent's testimony that

she would not continue the conference with the director present, and stated further that respondent was not polite to the director. He testified specifically that if "* * * the director didn't get out then she (respondent) would leave * * *." (1 Tr. 62-63).

R.B.'s mother testified that she told the director that she "* * * was quite shocked by the display of temper on Mrs. Williams' part, and after seeing how angry and how unglued she could become, that I thought it was quite possible that she did lose her temper and strike him. * * *" (1 Tr. 86). R.B.'s parents then kept him out of school for one week before permitting him to return.

The hearing examiner observes that support for this charge is found in the testimony of R.B.'s parents who assert that they believed their son when he told them he had been slapped by respondent, and that R.B. had reported being hit by pupils in the past, but he had never before said that a teacher had hit him until this incident, *ante* (1 Tr. 87-88).

Further support comes from C.F.'s mother, who also testified that her daughter had reported to her that she saw R.B. and others struck by respondents many times (4 Tr. 496-505).

The hearing examiner determines that the circumstantial evidence from the testimony of R.B.'s parents and C.F.'s mother supports the conclusion that respondent did in fact strike R.B. as charged. Further, respondent's defense, that R.B. was struck by J.E., is not supported by her confusing testimony.

Respondent's testimony is, that after J.E. struck R.B., she called J.E.'s mother to come "* * * to school tomor-

row morning * * *" to have a conference and that "* * * Mrs. (E.) promised me that she would take care of (J.E.) * * *" (6 Tr. 656-657). Mrs. E. was not brought in to corroborate this statement, nor was there offered an affidavit or other evidence to corroborate the purpose of that conference with J.E.'s mother. However, even if the conference proceeded as described by respondent, *ante*, her subsequent testimony relating to the scheduling of the meeting with R.B.'s parents is neither logical nor clear. It reads as follows:

> "* * * Q. Now, did you, on that same day, have a visit from (R.B.'s) parents?
>
> "A. Yes. That same day I did.
>
> "Q. Did you know that they were coming to the classroom?
>
> "A. I knew they were coming, because I set up the appointment for her to come the day before, but she couldn't make it, and I set the appointment up for the previous day, and that was the day that I set the conference for.
>
> "Q. So that you had originally set up the appointment for (R.B.'s) parents to come before (R.B.) and (J.E.) had not yet had this episode, or had they?
>
> "A. Yes, because (R.B.) hit—(J.E.) hit (R.B.) that day, before I had the conference, if I'm not mistaken, with Mrs. (E.), and then I told (R.B.)—I told (J.E.) that I was going to send for his parents, and I did.
>
> "Q. I'm asking you did you say that on the same day you had the conference with Mrs. (E.) you also had a meeting with (R.B.'s) parents?
>
> "A. That is right. That is right. I did.

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"Q. And I asked you whether you know that (R.B.'s) parents were coming to visit. You said you had—you did, rather.

"A. I did. I did.

"Q. When had you notified them, if you had, to come?

"Q. I see. Well, now, at the time you notified (R.B.'s) parents to come had (R.B.) and (J.E.) already had this altercation?

"A. They had.

"Q. They had?

"A. They had.

"Q. Okay. Were (R.B.'s) parents—and I hope I'm pronouncing their name correctly. (Pronunciation)

"* * * (Pronunciation)

"Q. When they came to your classroom were they alone?

"A. No.

"Q. Who was with them?

"A. Mr. Moretti. (6 Tr. 658-659)

If, in fact, J.E. had hit R.B. as respondent testified, and she called J.E.'s mother that night to come in for a conference the next day, then she could not have notified R.B.'s parents in time for a conference on the same day as she testified. Her testimony that "* * * I set up the appointment for her (R.B.'s mother) to come the day before, but she couldn't make it, and I set the appointment up for the previous day, and that was the day that I set the conference for * * * ," is unintelligble. (6 Tr. 658) Further, if R.B.'s parents had the conference, as respondent testified, on the same day that J.E.'s mother had hers, respondent's testimony that they were notified the day

before, but couldn't make it, is all the more confounding. (6 Tr. 658-659) Additionally, the director testified that he actually set the date for the parent conference and respondent's invitation was extended to R.B.'s parents because all teachers were required to have at least one parent conference during the year. (3 Tr. 321-323)

On the basis of the believable testimony, the hearing examiner recommends, therefore, that the Commissioner determine that respondent hit R.B. as alleged in Charge No. 8.

In regard to Charge No. 7, respondent does not deny that she refused to have the conference with R.B.'s parents in the director's presence, but denies being insubordinate. She testified that his presence at the conference was another form of harassment and that he did not sit in on conferences with other teachers. (6 Tr. 660-662)

In the judgment of the hearing examiner, respondent was insubordinate as charged.

CHARGE No. 9

> "You no longer have the capacity to be a teacher in the school system operated by this Board of Education, as demonstrated by the existence of psychiatric and psychological examinations and evaluations of you resulting from the examination and testing administered to you at the New Jersey State Diagnostic Center commincing on or about August 5, 1971."

On the basis of the original charges filed against respondent, the Board ordered her to submit to a psychiatric examination at the State Diagnostic Center at Menlo

Park to determine her continued fitness to teach. The Board furnished the examining psychiatrist with a comprehensive file of respondent's record which he reviewed before he examined her. He testified that he assumed all of the allegations in her file were true and that his examination was for the purpose of finding the reasons for her actions. (4 Tr. 484)

Respondent visited a psychiatrist of her choice to guard against the possibility of an exclusive finding by the Board-appointed psychiatrist. The testimony shows that the two psychiatrists agreed on some specific phases of their respective examinations and disagreed on others. However, neither determined that respondent was unfit to teach. The Board-appointed psychiatrist concluded, as a result of his examination, that possibly rest and psychotherapy would be best for respondent. (4 Tr. 467-468) Her own psychiatrist found no reason why she could not return to the classroom immediately.

N.J.S.A. 18A:16-2 provides that:

> "Every board of education shall require all of its employees, and may require any candidate for employment, to undergo a physical examination, the scope whereof shall be determined under rules of the state board, at least once in every year and may require additional individual psychiatric or physical examinations of any employee, whenever, in the judgment of the board, an employee shows evidence of deviation from normal, physical or mental health.
>
> "Any such examination may, if the board so requires, include laboratory tests or fluoroscopic or X-ray procedures for the obtaining of additional diagnostic data."

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The hearing examiner finds that no conclusive evidence was educed to show that respondent was mentally unfit to teach; therefore, he recommends that Charge No. 9 be dismissed.

Although respondent testified that she did not see the Board's charges against her prior to September 14, 1971, (6 Tr. 700-702) the testimony of her psychiatrist discloses that he was aware of the charges and, therefore, it raises a question concerning her credibility with respect to this allegation. (4 Tr. 548-549) Her psychiatrist testified that he and respondent discussed her seeking legal counsel. He also wrote the Commissioner of Education on September 9, 1971, and recommended "* * * treatment rather than dismissal * * * ," indicating that he had knowledge of the charges prior to September 14, 1971. He could only have learned of those charges through information supplied by respondent, since the record discloses he had no contact with the Board, but he did talk to respondent during August. He testified also that respondent called him and requested that he write the letter to the Commissioner, *ante*, when she learned she could not resume her teaching duties in September. From this sequence of events it must be logically concluded that respondent knew about the charges, or that they would be filed with the Commissioner, prior to September 14, 1971. (6 Tr. 548-549, 560) Respondent testified, also, that the psychiatrist at Menlo Park read some of the charges to her when she visited him on August 5, 1971. (6 Tr. 691-694)

CHARGE NO. 10

> "On June 18, 1971, you acted unprofessionally and in violation of your responsibility in stating you wished one of your pupils, (C.F.), had stayed home and not come to school on the stated date."

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This charge is a result of a memo sent to the director of special services in Roselle by a school social worker who transported C.F. to respondent's classroom on June 18, 1971. C.F. had missed her bus ride to Union and when she was escorted into respondent's classroom by the social worker, respondent allegedly said "(C.F.) couldn't you have stayed home today. * * *" This comment disturbed the social worker so that she reported the incident to the director of special services in Roselle who asked her to write it in a memo. (P-6)

Respondent denies making the comment, *ante*, and testified that she made up a little nursery rhyme about C.F.'s late entrance to her classroom. (6 Tr. 682) She testified further that C.F. had two seizures the day before and that ordinarily a child so affected should remain at home on the following day; therefore, she didn't expect C.F. in class but was happy to see her. (7 Tr. 759-762) Respondent testified as follows regarding her "nursery rhyme":

> "* * * I looked at (C.F.) and said to her, I said you used to come at nine o'clock. Now you come at ten. So how do you do, and that was all that was said. * * *" (6 Tr. 682)

There is no additional testimony to corroborate the allegations made by the school social worker. However, even if respondent's version, as testified, *ante*, is accepted as true, it is the hearing examiner's opinion that the "rhyme" is sarcastic.

Sarcasm, which may be defined as a cutting rebuke or a caustic remark directed at the weakness of its victim, has no legitimate standing as a teaching tool. (*Webster's Third New International Dictionary*) The hearing ex-

aminer does not believe that the pupils in this trainable class could understand respondent's "rhyme." However, even if they could, respondent's "rhyme" cannot be construed to be instructive, informative, entertaining or helpful to C.F. or the other pupils in any way.

The hearing examiner concludes that respondent's comment made pursuant to Charge No. 10 was sarcastic and unprofessional, and he recommends that the charge be sustained.

CHARGE NO. 11

> "On June 23, 1971, you absented yourself from your classroom, leaving it unsupervised, thereby engaging in unbecoming conduct and violating law and Board policy."

Respondent testified that she did leave her class on that date to visit the office to secure a cumulative record card. She said her class was orderly and the pupils did not want to accompany her because they were listening to music. Knowing she would be gone only a few minutes, she left the classroom. She testified that as she turned the corner to walk up the hallway she saw "* * * Dr. Lawrence and Mr. Holly, I said oh my God. There ain't no point in me turning around now." (6 Tr. 679) Therefore, she continued to the office, picked up the record card, and then returned to her classroom. She testified that she was gone about five minutes, and nothing unusual happened in her classroom during her absence.

The director testified that the rule of the Board is that teachers of special education pupils, especially, were never to leave their pupils unsupervised, and that in the event it became necessary for the teacher to leave the classroom

for any reason, a replacement for that class could be easily arranged. (2 Tr. 257-258)

There was on denial of the existence of such a Board rule; in fact, respondent's testimony, *ante,* indicates her awareness that she had improperly left ther class unsupervised.

CHARGE No. 12

> "On May 28, 1971, you intentionally filed a false and untrue report with the Board of Education in that you falsely accused a parent, Mrs. (C.M.), of cursing you and attempting to assault you, thereby acting in a unprofessional manner."

The false report referred to is respondent's letter (P-11) and her testimony (6 Tr. 678) which accused C.M.'s mother of cursing and threatening to assault her when they met, after respondent was accused of striking C.M.

Although C.M.'s mother denied cursing or threatening respondent, there is no corroboration to support the testimony of either C.M.'s mother or respondent.

The hearing examiner recommends that this charge be dismissed.

CHARGE No. 13

> "On or about November 23, 1971, Mrs. Sally Williams intentionally failed to follow an order and directive of the Board of Education requiring her to be examined by Dr. David Fink, thereby being insubordinate."

CHARGE No. 14

> "On or about November 23, 1971, Mrs. Sally Williams intentionally and willfully chose to disregard

a directive of the Board of Education that was issued pursuant to law, thereby showing disrespect for the Board of Education and violating the law."

These charges will be discussed together because they relate to a single incident.

The hearing examiner observes that the Board resolution certifying these charges is dated December 21, 1971, almost three months after the first twelve charges were certified. Respondent had been suspended from her employment since the beginning of the school year and had already submitted to the psychiatric examination ordered by the Board (Charge No. 9) which commenced in August 1971. In addition, she visited a psychiatrist of her choice for an additional analysis.

N.J.S.A. 18A:16-3 gives the Board the authority to order psychiatric examinations whenever, in its judgment, it would appear to be necessary. However, it appears to the hearing examiner that the Board ordered the second psychiatric examination because it was not satisfied with the first. The hearing examiner reaches this conclusion because respondent did not teach for the Board between the time the orignal and supplemental charges were filed; therefore, the Board could not have ordered the second examination on the basis of new information gleaned from her employment during her suspension, and no evidence was offered regarding respondent's activities outside the classroom that would relate to her employment.

Under the specific circumstances relating to these charges, the hearing examiner recommends that they be

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This concludes the report of the hearing examiner.

• • •

The Commissioner has reviewed the report of the hearing examiner and the record in the instant matter, and has also reviewed the exceptions to the hearing examiner's report filed by counsel for both parties.

The Commissioner takes notice of respondent's objection to the references regarding the handicapped pupils' communications, and will comment further upon the problem of securing the testimony of children classified as trainable mentally retarded under N.J.S.A. 18A:46-9, *post.*

Both the reference by respondent to the time period covered in the events specified in the charges and the testimony of the substitute teacher (5 Tr. 594-617) have been reviewed by the Commissioner. The essence of the testimony of the substitute teacher is that at no time did the trainable pupils in respondent's class express resentment or hostility against respondent in the presence of the substitute teacher.

The Commissioner has also carefully reviewed respondent's exception concerning the testimony provided by one witness in regard to Charges Nos. 2 and 12. Finally, the Briefs of the parties have been reviewed by the Commissioner.

Although the Board moved to strike the pleadings and defense of respondent at the beginning of the hearings, the Commissioner finds that neither party complied in full with their mutual agreement to answer interrogatories. Also, the hearing examiner set forth a procedure at the initial hearing which would have enabled counsel

to issue certain interrogatories (1 Tr. 7, 10). No request to follow that procedure was pursued; therefore, the Board's Motion, *ante,* is denied. Additionally, Charges Nos. 3, 5, 9, 12, 13, 14 are dismissed on the basis of the report and recommendations of the hearing examiner.

CHARGES NOS. 1, 8

These are charges of corporal punishment and the Commissioner determines that respondent struck the pupils as charged.

Corporal punishment of pupils has been prohibited in New Jersey public schools by statute since 1867. N.J.S.A. 18A:6-1. However, with allegations of corporal punishment, the Commissioner has always been mindful that the testimony of children must be examined with great care. The Commissioner said *In the Matter of the Tenure Hearing of David Fulcomer,* 1962 S.L.D. 160, remanded State Board of Education 1963 S.L.D. 251, decided by the Commissioner 1964 S.L.D. 142, affirmed State Board of Education 1966 S.L.D. 225, reversed and remanded 93 N. J. Super. 404 (App. Div. 1967), decided by the Commissioner 1967 S.L.D. 215:

> "'* * * It is the opinion of the Commissioner that testimony of children, especially of those ten years of age, against a teacher, whose duty it is to discipline them, must be examined with extreme care. It is dangerous to use such testimony against a teacher; it is likewise dangerous not to use it. The necessities of the situation sometimes make it necessary to use the testimony of school children. If such testimony were not admissible, the children would be at a teacher's mercy because there is no

> way to prove certain charges except by the testimony of children.' *Palmer* v. *Board of Education of Audubon,* 1939-49 S.L.D. 183, 188. * * *" (at p. 161)

In the instant matter, there was no testimony by children against respondent. However, there is overwhelming support of the charges by the testimony of the parents regarding the incidents reported to them by their children. Also, the testimony of teachers, concerning their pupils' reports to them, supports that of the parents. This is convincing, in the Commissioner's judgment, to sustain the hearing examiner's findings of the truth of the charges.

CHARGES NOS. 2, 10

With regard to Charges Nos. 2 and 10 the Commissioner finds that respondent's actions did intimiate some of her pupils and that she did employ sarcasm. The Commissioner commented in *Palmer, supra,* at p. 187 as follows:

> "Educators stress the fact that the concomitants of learning are important as well as the learning itself. A pupil not only learns subject-matter, but he learns to like or dislike it. He forms attitudes. His emotional life is affected. Regardless of how efficient a teacher is in teaching subject-matter and skills, she is not justified in doing so at the cost of unnecessary emotional upsets. Good mental hygiene is important in child growth and promotes intellectual achievement.
>
> "A good teacher can exercise better control and show better results in the pupils' acquisition of

> subject-matter than can the teacher who resorts to ridicule and sarcasm. Lack of respect for the personality of the child produces inefficiency. * * *"

In the instant matter it has been shown in Charges Nos. 1, 2, 8, and 10 that a pattern of conduct by respondent caused intimidation, and apprehension, if not fear, in some of her pupils.

In the Matter of the Tenure Hearing of Thomas Appleby, decided by the Commissioner of Education November 25, 1969, the Commissioner said:

> "* * * While the Commissioner understands the exasperations and frustrations that often accompany the teacher's functions, he cannot condone resort to force and fear as appropriate procedures in dealing with pupils, even those whose recalcitrance appears to be open defiance. The Commissioner finds in the century-old statute prohibiting corporal punishment (N.J.S.A. 18A:6-1) an underlying philosophy that an individual has a right not only to freedom from bodily harm but also to freedom from offensive bodily touching even though there be no actual physical harm. *In the Matter of the Tenure Hearing of Frederick L. Ostergren,* 1966 S.L.D. 185, 186 * * * ." (at pp. 172-173)

and:

> "* * * Thus, when teachers resort 'to unnecessary and inappropriate physical contact with these in their charge (they) must expect to face dismissal or other severe penalty. *In the Matter of the Tenure Hearing of Frederick L. Ostergren, supra.* * * *" (at p. 173)

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With respect to Charges Nos. 4 and 11, the Commissioner determines that respondent left her class unsupervised for a limited time during those school days.

Although it is impossible to spend every minute with the pupils in a classroom, it is certainly expected that teachers must exercise continuous control over their classes by their physical presence.

The hearing examiner found that respondent's defense to Charge No. 4 was unsupportable. Respondent does not deny the allegations of Charge No. 11; rather, she attempts to rationalize her actions. The Commissioner determines that respondent did not avail herself of the opportunity to secure a replacement and that she was aware that she should not leave her class unsupervised.

These charges of conduct unbecoming a teacher are, therefore, sustained.

With respect to Charge No. 6, the Commissioner determines that the manner in which respondent entered her supervisor's office to complain about being harassed, the time she selected to go there, between classes, and her own testimony, *ante*, regarding this incident, provide sufficient evidence to support the charge of insubordination.

With respect to Charge No. 7, the Commissioner determines that respondent was insubordinate by refusing to conduct the conference as directed. Her supervisor had been contacted by R.B.'s parents and it is the Commissioner's judgment that the supervisor had good reason and the authority to be present. Moreover, the record respecting Charge No. 7 discloses sufficient reason for the supervisor to be present at the conference. He was concerned about the allegation of corporal punishment by

R.B.'s parents. The record, therefore, does not support respondent's claim that she was being harassed.

With regard to the testimony of the director of pupil personnel services about the mental capabilities of trainable children, and educators' knowledge of the abilities of these children, the Commissioner determines that it would have been improper to try to elicit their testimony at the hearing. Therefore, the record as developed relies in part on hearsay testimony, without which, it would have been impossible to develop several of the Board's charges.

The Commissioner is constrained to observe that much of the evidence herein adduced through the testimony of parents and teachers, is hearsay and circumstantial. It is understandable that no attempt was made to secure testimony from the trainable pupils in the matter *sub judice.*

The Commissioner is very much aware of the mental capabilities of trainable children. Any attempt to elicit competent testimony from these pupils would have been emotionally distressing, and would have inflicted unnecessary anguish and suffering on the minds of these pupils. Trainable pupils are unable to properly understand or cope with formalized questions of the type that would have to be posed in an adversary hearing. The Board's determination not to seek their testimony was a sound educational decision which prevented further hardship on these unfortunate pupils. Therefore, the Commissioner agrees with the hearing examiner's decision to permit this hearsay testimony in order to make his final determinations and recommendations.

In *State* v. *Graziani,* 60 N. J. Super. 1 (App. Div. 1959); affirmed 31 N. J. 538 (1960); cert. denied 303 U. S.

830 (1960) the Court quoted from *State* v. *Greenberg,* 105 N.J.L. 383, 385 (E. & A. 1928), when it held that "• • • circumstantial evidence is often 'more certain, satisfying and persuasive than direct evidence.'" See also, *State* v. *Carbone,* 10 N. J. 329, 339 (1952); *State* v. *Corby,* 28 N. J. 106, 119 (1958); *State* v. *Fiorello,* 36 N. J. 80 (1961). In *Graziani,* the Court also held that:

> "The probative value of circumstantial evidence is determined by the rules of ordinary reasoning such as govern mankind in the ordinary affairs of life. • • •" (at p. 13)

In the instant matter there is an abundance of circumstantial evidence from which the Commissioner can draw the reasonable inference that respondent committed the offenses as detailed in Charges Nos. 1, 2, 4, 6, 7, 8, 10, and 11.

The Commissioner holds that the record herein discloses a pattern of conduct by respondent which is unprofessional and constitutes unbecoming conduct for a teacher. Specifically, respondent has been found to have committed corporal punishment against two of her pupils; instilled fear in her pupils, and has been insubordinate to her supervisor. Therefore, respondent must forfeit the tenure protection that the statutes afford teaching staff members who have complied with their minimum requirements.

Such a conclusion is consistent with many previous decisions of the Commissioner. *In the Matter of the Tenure Hearing of Herman B. Nash, School District of the Township of Teaneck, Bergen County,* decided by the Commissioner June 22, 1971; *In the Matter of the Tenure Hearing of Francis Bacon, School District of the Town-*

ship of Monroe, Gloucester County, decided by the Commissioner August 12, 1971; *In the Matter of the Tenure Hearing of Joseph Maratea, Township of Riverside, Burlington County,* 1966 S.L.D. 77, affirmed State Board of Education, affirmed New Jersey Superior Court, December 1, 1967; *In the Matter of the Tenure Hearing of Kathleen M. Pietrunti, Township of Brick, Ocean County,* decided by the Commissioner July 19, 1972, affirmed State Board of Education April 4, 1973 (reversed in part on the question of retroactive applicability of L. 1971, c. 435, 502).

In one of the cases, *ante, Francis Bacon,* the Commissioner found that even one incident of unprofessional conduct might be sufficient to warrant a judgment that the teachers had demonstrated unfitness for the positions they held, and in *Bacon* the Commissioner quoted *Redcay* v. *State Board of Education,* 130 N.J.L. 369, 371 (1943), affirmed 131 N.J.L. 326 (E. & A. 1944) to buttress this position. The Court in that decision said:

> "* * * Unfitness for a task is best shown by numerous incidents. Unfitness for a position under the school system is *best evidenced by a series of incidents.* Unfitness to hold a post might be shown by one incident, if sufficiently flagrant, but it might also be shown by many incidents. Fitness may be shown either way. * * *" (*Emphasis supplied.*) (at p. 371)

In the proven charges herein, in the Commissioners judgment, are "the series of incidents" referred to in *Redcay,* which are the best evidence that respondent should be dismissed.

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Accordingly, having found Charges Nos. 1, 2, 4, 6, 7, 8, 10, and 11 to be true in fact and having determined that they are sufficiently serious to warrant respondent's dismissal from her position as a teacher in the Union Township School System, the Commissioner hereby dismisses respondent as of the date of her suspension.

EDWIN W. KIRKPATRICK
ACTING COMMISSIONER OF EDUCATION

October 10, 1973

APPENDIX D

Decision of the State Board of Education

In the Matter of the Tenure Hearing of Sally Williams, School District of Union Township, Union County.

Decided by the Commissioner of Education, October 10, 1973

For the Complainant-Appellee Board of Education, Simone and Schwartz (Howard Schwartz, Esq., of Counsel)

For the Respondent-Appellant, Rothbard, Harris & Oxfeld (Emil Oxfeld, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

Mr. Calvin J. Hurd took no part in the decision of this case.

February 6, 1974

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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-1534

SALLY WILLIAMS,

Petitioner,

vs.

BOARD OF EDUCATION OF UNION TOWNSHIP, UNION COUNTY, N. J.

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY–APPELLATE DIVISION

BRIEF IN OPPOSITION TO ISSUANCE OF WRIT OF CERTIORARI

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I. BRIEF STATEMENT OF REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The Board of Education of Union Township, Union County, New Jersey opposes the petition for *certiorari* herein for the reasons hereinafter stated.

A. *No federal question was decided*

Rule 19 of this Court provides that a "writ will be granted only where there are special and important reasons therefor." Generally, a federal question must have been decided in the state court in such manner as to require consideration here.

The New Jersey Courts decided no federal question in this case because none was presented to them.

The present Petitioner did not raise any federal question before the Commissioner of Education, the State Board of Education, the Appellate Division of the Superior Court of New Jersey, or the New Jersey Supreme Court.

B. *The state decision is in accord with decisions of this court*

The decision complained of is the admission of some hearsay in an administrative proceeding. As will be seen, the decision of the state courts and agencies is in accord with decisions of this court and the weight of authority.

C. *Petitioner acquiesced*

The Petitioner acquiesced in the presentation of the hearsay, had adequate opportunity to subpoena for cross-examination the witnesses whose statements were admitted, and did not do so. Further, Petitioner introduced in her defense precisely the same type of hearsay.

PLEASE THROUGH

D. *Petitioner received a full and fair hearing*

The transcript of the testimony consists of nearly 800 pages in seven volumes. There were seven hearing days. A large number of exhibits were introduced into evidence. Defendant was represented by outstandingly able counsel. Full opportunity was afforded for cross-examination, for presentation of evidence, subpoenas were available to her. Every available legal and factual defense was presented on her behalf.

E. *There was persuasive non-hearsay evidence*

Adequate non-hearsay evidence was presented to establish sufficient charges against Petitioner to require her dismissal. The truth of the charges was established beyond a reasonable doubt. (P.A. 4a-16-23)

II. RESPONDENT'S COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether any hearsay may be placed in evidence against a tenured teacher in an administrative hearing leading to her removal from employment:

> (a) Where the teacher has the opportunity to call the witnesses whose statements are placed in evidence for cross-examination but makes no effort to do so.
>
> (b) Where the hearsay would be admissible at a jury trial under an exception to the hearsay rule. N.J. Rules of Evidence Rule 63(4) and Rule 63(12); Rules of Evidence, United States Courts etc., Rule 803.
>
> (c) Also where the hearsay would not be admissible at a jury trial but it is provided by statute (P.B.-7, N.J.S.A. 52:14B-10) that the parties shall not be bound by rules of evidence, the hearsay is trustworthy and persuasive, and merely corroborative of competent evidence. (Opinion of Appellate Division of Superior Court of N.J., P.A. 4a to 8a).

2. Whether under any provision of the First, Sixth, or Fourteenth Amendments to the Constitution of the United States the procedure referred to in Question 1 is a deprivation of due process of law.

3. Whether the First, Sixth, or Fourteenth Amendments prohibit a state administrative agency from receiving the testimony of an expert that trainable children lack the mental capacity "either to fabricate an untruth or to conspire to tell the same untruth" (Pa7a–3-5), when there is no objection thereto and no contradiction thereof, and whether the same may be considered as a factor in weighing the evidence.

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III. RESPONDENT'S COUNTER-STATEMENT OF FACTS

At p. 4-8 *et. seq.* of Petitioner's Brief it is said:

> ". . . but, in the instant case, the findings of dismissal were predicated upon a totally invalid and completely unsubstantiated theory of child psychology which alleges that handicapped children are incapable of fabricating any kind of story and that complete reliance can be placed upon any matter which such children relate, even when transmitted through third persons . . ."

It is not the fact that "the findings of dismissal were predicated" upon the premise described. Also the premise was substantiated. The finding that the Petitioner was guilty of eight of fourteen charges of gross misconduct as a teacher, including two instances of striking children, was grounded upon much direct and circumstantial evidence. Only three of the eight charges were supported by any hearsay (P.A. 4a-16-23).

The Appellate Division spelled out the bases for accepting the hearsay and finding it trustworthy in the surrounding circumstances and the testimony of several sets of parents and four teachers and administrators (P.A. 6a-28 to 7a-9). The Court added: (P.A.7a-2-5)

> "Coupled with the testimony that these declarants, trainable children, lacked the mental capacity either to fabricate an untruth or to conspire to tell the same untruth, they are clearly admissible."

There was testimony by an expert to that effect. At p. 263 of Vol. II of the transcript (noted by the Appellate Division, P.A. 6a-8-12) Frank A. Moretti, Director of Student Personnel Services in the Union Township Schools,

whose qualifications as an expert were established without dispute, testified as follows:

> "Trainable children cannot think abstractly. For instance, they would not have the cognitive power to be able to say this is a fact and this is not a fact, and make up a story which will be a lie, in effect, because they have not cognition in that area."

This testimony was not objected to and no testimony or evidence of any kind was presented to the contrary. No authority to the contrary is cited by Petitioner, who relies on mere assertion

The Commissioner of Education, as well as the Hearing Examiner were educators with substantial expertise. The Commissioner held (P.A.-48a and 49a):

> "The Commissioner is very much aware of the mental capabilities of trainable children. Any attempt to elicit competent testimony from these pupils would have been emotionally distressing, and would have inflicted unnecessary anguish and suffering on the minds of these pupils. Trainable pupils are unable to properly understand or cope with formalized questions of the type that would have to be posed in an adversary hearing. The Board's determination not to seek their testimony was a sound educational decision which prevented further hardship on these unfortunate pupils. Therefore, the Commissioner agrees with the hearing examiner's decision to permit this hearsay testimony in order to make his final determinations and recommendations.
>
> In *State v. Graziani*, 60 N.J. Super. 1 (App. Div. 1959); affirmed 31 N.J. 538 (1960); *cert.* denied 363 U.S. 830 (1960) the Court quoted from *State v. Greenberg*, 105 N.J.L. 383, 385 (E. & A. 1928), when it held that '. . . circumstantial evidence is often 'more certain, satisfying and persuasive than direct

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evidence.'' See also, *State v. Carbone*, 10 N.J. 329, 339 (1952); *State v. Corby*, 28 N.J. 106, 119 (1958); *State v. Fiorello*, 36 N.J. 80 (1961). In *Graziani*, the Court also held that:

> 'The probative value of circumstantial evidence is determined by the rules of ordinary reasoning such as govern mankind in the ordinary affairs of life . . .' (at p. 13)

In the instant matter there is an abundance of circumstantial evidence from which the Commissioner can draw the reasonable inference that respondent committed the offenses as detailed in Charges Nos. 1, 2, 4, 6, 7, 8, 10, and 11.

The Commissioner holds that the record herein discloses a pattern of conduct by respondent which is unprofessional and constitutes unbecoming conduct for a teacher. Specifically, respondent has been found to have committed corporal punishment against two of her pupils; instilled fear in her pupils, and has been insubordinate to her supervisor. Therefore, respondent must forfeit the tenure protection that the statutes afford teaching staff members who have complied with their minimum requirements."

Nowhere in the case was an "irrebutable presumption" (P.B. 7, heading) or a "conclusive presumption" (P.B. 8-23-24) applied as alleged by Petitioner.

IV. THE EXCLUSION OF ALL HEARSAY IS NOT A REQUIREMENT OF DUE PROCESS

Respondent concedes that Petitioner was entitled to due process in the conduct of the administrative proceedings resulting in her discharge from employment. She was given a full and fair hearing with the right to subpoena witnesses and to confront and cross examine witnesses against her.

The hearsay exclusionary rule is not a provision of the Constitution of the United States nor has it been read into the Due Process clause. *Richardson v. Perales,* 402 U.S. 389, 91 S. Ct. 1420, 28 L.Ed.2nd 842 (1971); *Dutton v. Evans,* 400 U.S. 74, 91 S. Ct. 210, 27 L.Ed.2nd 213 (1970); *Consolidated Edison Co. v. National L. Rel. Bd.,* 305 U.S. 197 at 229-230, 83 L.Ed. 126 at 140, 59 S. Ct. 206 at 217 (1938); *Willapoint Oysters v. Ewing,* 174 Fed. 2d 676 at 690 (C. A. 9th, 1949); *cert. denied,* 338 U.S. 860, 70 S. Ct. 101, 94 L.Ed. 527 (1949); *Jacobowitz v. United States* (U.S. Court of Claims, 1970) 424 Fed. 2d 555, 6 A.L.R. Fed. 61; Annotation: Hearsay Evidence in Proceedings before Federal Administrative Agencies, Ernest H. Schopler, S.J.D., 6 A.L.R. Fed. 76 *et. seq.*

The right to confrontation of witnesses in so far as applicable is satisfied by the right to subpoena opposing witnesses for cross examination, failure to do which estops the Petitioner from claiming a deprivation of confrontation. *Richardson v. Perales* (*supra*); *Peters v. United States* (1969) 187 Ct. Cl. 63, 408 F.2d 719 at 723.

The hearsay in this case was reliable and such "as a reasonable mind might accept as adequate to support a conclusion." *Con. Edis. v. Nat'l. Relations Bd.* (*supra*). It was also supported by direct, eyewitness evidence, by Petitioner's own testimony and manner of testifying, and by surrounding circumstances.

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Most of the evidence was legally admissible under the well recognized spontaneous exclamation and physical condition exceptions to the hearsay rule. N.J. Rules of Evidence, *R.* 63 (4) and *R.* 63 (12); Fed. Rules of Evidence, as amended July 1, 1975, *R.* 803 (2) and (3); Wigmore on Evidence, (Third Edition) Vol. VI, §1746, pp. 134, 135, 139, §1751 pp. 155 and 156.

V. PETITIONER IS ESTOPPED BY HER TRIAL STRATEGY

As set out in her brief to the Commissioner (P.A.-14a and 15a), Petitioner failed to call the children for cross-examination and used hearsay of statements of other children in her defense (transcript 596-597).

Having made this choice as a stratagem, Petitioner may not now rely upon it for reversal.

In *Henry v. Mississippi*, 379 U.S. 443, 13 L.Ed.2d 408, 85 S. Ct. 564 (1965) the United States Supreme Court in an opinion by Mr. Justice Brennan, held, as well summarized in headnote 8, as follows:

> "Any deliberate choice by defense counsel to delay objection to tainted evidence either to discredit witness offering evidence or to invite error will amount to a waiver binding on defendant and preclude him from decision on merits of federal claim with respect to admission of tainted evidence, either in state or federal court."

To like effect is the holding of the New Jersey Supreme Court in *State v. Gainer*, 48 N.J. 376, 225 A.2d 578 (1967).

A similar holding in *Richardson v. Perales* is referred to at page 7 *supra*.

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VI. CONCLUSION

It is respectfully submitted that there is no special important reason for reviewing this case. There is moral or legal reason for this Court to intervene. P tioner was fairly and justly, even solicitously treated. T welfare and safety of the children who would be in charge and who can hardly speak for themselves requi the action taken by the school authorities. That act was sustained by able and fair-minded State educatio authorities, an intermediate appellate court of great co petence, and was denied review by a State Supreme Co deeply sensitive to the rights of all.

The petition should be denied.

Respectfully submitted,

/s/ Howard Schwartz
HOWARD SCHWARTZ,
Attorney for Respondent Boa of Education of Union Townsh Union County, N.J.

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Of Counsel

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1554

SALLY WILLIAMS,

Petitioner,

vs.

BOARD OF EDUCATION OF UNION TOWNSHIP, UNION COUNTY, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1534

SALLY WILLIAMS,

Petitioner,

vs.

BOARD OF EDUCATION OF UNION TOWNSHIP, UNION COUNTY, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION

Counter-Statement of Questions Involved

1. Should a writ of certiorari be granted where it appears that the action of a state agency in upholding the dismissal of a teacher and the affirmance of that decision by a state court was substantially grounded in matters as to which there is no claim of a denial of a federal constitutional right?

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2. Did the state appellate court err in sustaining the admission of hearsay testimony where the declarants were not made available for cross-examination by mutual agreement of the parties?

Counter-Statement of the Case

By resolution dated September 1, 1971, the Board of Education of Union Township, pursuant to N.J.S.A. 18A: 6-10 *et seq.*, certified to the New Jersey Commissioner of Education twelve charges against petitioner, Sally Williams, a tenured teacher of mentally retarded children, indicating that such charges, if proven, would warrant her dismissal. On December 21, 1971, the Board certified to the Commissioner two supplemental charges of insubordination against her.

After a hearing, the Commissioner found the evidence supported eight of the charges* and concluded these sufficiently serious to warrant her dismissal. Under Charge 6, petitioner was charged with insubordination toward her supervisor in that she entered his office, interrupting a phone conversation, threatening him and making loud and disparaging remarks. On a second occasion, she refused to meet with parents in her supervisor's presence, giving rise to Charge 7, also insubordination. Charge 10 was based on petitioner's suggestion to a student who arrived late to school, that she should have stayed home. It was heard and testified to by a social worker who had accompanied the child that morning. Charges 4 and 11 charged her with leaving the classroom unattended on two separate occasions. These five charges have not been challenged on appeal.

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* Four of the original charges and both supplemental charges were dismissed.

The remaining three charges sustained by the Commissioner were established primarily by hearsay evidence since the complainants were handicapped children, classified as trainable mental retardates pursuant to N.J.S.A. 18A:46-9*, whose absence was consented to in advance by agreement of the parties. These three charges, two of corporal punishment and one of intimidation related thereto, were proved by testimony of parents and other teachers who had observed the bruises of one child allegedly stricken and to whom this child and others had communicated their recollection of the events giving rise to the charges. The Commissioner was persuaded by the demeaner of the witnesses and testimony establishing the reliability of the hearsay that these charges were made out.

By his opinion dated October 10, 1973, the Commissioner found these instances of insubordination and unprofessional conduct had the cumulative effect of demonstrating her unfitness to continue in the position she had held, and ordered her dismissal. Following this determination, an appeal was filed with the State Board of Education which on February 6, 1974 affirmed the Commissioner's decision dismissing petitioner.

An appeal was then taken to the Superior Court of New Jersey, Appellate Division, which affirmed the State Board

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* N.J.S.A. 18A:46-9 defines as "trainable":

> "[children] so severely retarded that they cannot be classified as educable but are, notwithstanding, potentially capable of self help, of communicating satisfactorily, of participating in groups, of directing their behavior so as not to be dangerous to themselves or others and of acheiving with training some degree of personal independence and social and economic usefulness within sheltered environments."

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decision in an opinion rendered on January 15, 1975.* The court concluded that the record supported the Commissioner's findings and his conclusion based thereon that petitioner had exhibited a pattern of unprofessional conduct unbecoming a teacher and warranting dismissal. The court held the proofs sufficient to justify the Commissioner's decision without regard to the three charges supported by challenged evidence. Each of the five charges unaffected by the appeal was established by substantial credible evidence. The insubordination charges (6 and 7) were established by testimony of the Director of Student Personnel Services, witness to both instances of misconduct. And with respect to Charges 4 and 11, the Director testified that teachers were never permitted to leave their classes unsupervised, and that this rule was particularly important in the case of handicapped children. Indeed the petitioner's testimony indicated her awareness that she had violated that rule (Pa41). Hence, these sufficed to exhibit the cumulative instances of unfavorable conduct warranting dismissal. *Redcay* v. *State Bd. of Ed.*, 130 N. J. L. 369, 371 (Sup. Ct. 1943), aff'd 131 N. J. L. 326 (E. & A. 1944). With respect to the three disputed charges, the court considered the hearsay statements relied upon by the Commissioner and in each in-

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* Petitioner has not named the State Board of Education as a respondent herein. It is assumed that this omission was inadvertent since the State Board was a party to the proceedings in the State Court and the Attorney General of New Jersey, as counsel to the State Board, has been properly served. It is New Jersey law that where an appeal is taken from the quasi-judicial decision of a state administrative agency, that agency is a party to the appeal. Pressler, *Current N. J. Court Rules*, R. 2:5-1(e). Rule 21(4) requires that all parties to the proceeding in the court whose judgment is sought to be reviewed shall be deemed parties in this Court.

stance found them admissible. Statements made by the child stricken to his mother and statements made by students who had witnessed the incident to other teachers were held admissible under the *res gestae* exception to the hearsay rule as they were made within a reasonable proximity to the event described and without opportunity to fabricate. In support of this, testimony was offered by the Board that "trainable" children lack the mental capacity either to fabricate an untruth or to conspire to tell the same untruth. No evidence refuting this position was presented on behalf of petitioner. Testimony of the two teachers who observed the bruises of one child shortly after the injury was held admissible as circumstantial evidence relevant to the charge and based on the personal knowledge of the witnesses. And the statements made by several children in the school bus to the mother of the injured child identifying petitioner as the assailant were admissible as corroborative of other competent proof, for which purpose hearsay inadmissible in a judicial proceeding may be received in the administrative context. *State* v. *Weston*, 60 N. J. 36, 51 (1952); N.J.S.A. 52:14B-10.

On March 11, 1975, the Supreme Court of New Jersey denied petitioner's petition for certification. Mrs. Williams filed her petition for a writ of certiorari on June 6, 1975.

ARGUMENT

The Court should not grant a writ of certiorari because the state court's decision was substantially grounded in matters as to which no federal constitutional claim is advanced.

It is well established that the Court only has jurisdiction to review the judgment of a state court where the record shows that a federal question was raised, and that it was decided adversely to the petitioner. The record must also show that the federal question was necessarily involved in the decision, and that the state court could not have rendered its judgment without deciding it. If that judgment can be sustained on other than federal grounds, the court will not revise it even though a federal question may also have been decided, and even though that question may have been decided incorrectly. *Williams* v. *Kaiser,* 323 U. S. 471, 477-78 (1945); *Smith* v. *Adsit,* 83 U. S. 185, 189 (1873).

In the instant case, fourteen charges against petitioner were certified to the Commissioner by the local school board, pursuant to N.J.S.A. 18A:6-10, which lists as grounds for proper dismissal of a tenured teacher inefficiency, incapacity, unbecoming conduct or other just cause. The Commissioner concluded that six of the fourteen charges should be dismissed. He sustained the remaining eight. Of these, five were established by the testimony of witnesses to the instances of alleged misconduct. Three were supported by testimony of parents and teachers which included statements made to them by the children in petitioner's class but not present at the hearing. It is these charges that were challenged on appeal as improper because based on incompetent evidence and as to which petitioner herein urges denial of her right to confront her accusers.

New Jersey case law clearly recognizes the confrontation interest in the disciplinary context for school children. *Tibbs* v. *Board of Education of Franklin Tp.*, 59 N. J. 506 (1971), aff'g 114 N. J. Super. 287 (App. Div. 1971). It is reasonable to assume that in a proper case New Jersey courts will recognize that interest in the tenured teacher dismissal context as well, since New Jersey has been a leader in State fashioned procedural rights. See, *e.g., Donaldson* v. *No. Wildwood Bd. of Ed.*, 65 N. J. 236 (1974) (statement of reasons for nonrenewal of nontenured teachers' contracts). But confrontation requires a demand that the witnesses be present. Here contrary to a demand to confront there was a waiver. Prior to the hearing, the parties agreed not to call these children for testimony, both because all concerned desired to spare them the emotional trauma of an adversarial proceeding and because their legal competency as witnesses was questionable. Petitioner, in so agreeing, conceded below that without their testimony the proofs introduced to sustain the charges would include hearsay evidence (Pa14). Having participated in this decision to exclude their testimony, she cannot now rely on the right to demand the presence of "accusing" witnesses accorded by State law in *Tibbs* v. *Board of Education of Franklin Tp., supra. Cf. Schneckloth* v. *Bustamonte*, 412 U. S. 218 (1973). Nor does the hearsay nature of the testimony alter this conclusion since, as correctly discerned by the Appellate Division, for the most part this hearsay was admissible within the *res gestae* exception to hearsay rule. N. J. Evid. R. 63(4). In fact, the testimony of the teachers who personally observed the bruises of a stricken child is not hearsay at all. And the testimony of the children on the school bus only added to a residuum of competent testimony and so was clearly permissible under State law relating to administrative hearings. *State* v. *Weston*, 60

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N. J. *supra* at 51; N.J.S.A. 52:14B-10. *Cf. Dutton* v. *Evans*, 400 U. S. 74 (1970).

Beyond the confrontation-hearsay issues, and dispositive of this petition, is the fact that the Commissioner's decision to dismiss the petitioner was found by the Appellate Division to be independently justified on the basis of the undisputed charges (Pa4). Five of the eight charges sustained were unaffected by the challenged evidence. They included two separate acts of insubordination and unauthorized absences from the classroom on two occasions for the duration of which a class of mentally retarded children was left unsupervised, exposed to harm by their own acts and the acts of each other. The fifth, witnessed and reported by a social worker, was based on petitioner's greeting a late student, upon her arrival, with "why couldn't you have stayed home today?" Petitioner's testimony that instead she had composed a rhyme about the late arrival, which she recited, revealed equally unprofessional conduct in the use of public sarcasm to no educational purpose, designed solely to embarrass and intimidate the child publicly.

These five charges alone manifested recurrent instances of professionally irresponsible behavior justifying the Commissioner's decision to dismiss. The requisite pattern of misconduct is established. The charges relating to physical abuse only embellished an already substantial record.

Absent any clear showing that the State Appellate Court relied only or primarily on federal grounds, and confronted with apparent relinquishment of the right now asserted, it is respectfully submitted that this case does not provide an appropriate context in which to consider the federal constitutional questions which petitioner has attempted to project for the Court's discretionary review.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that Williams' petition for a writ of certiorari should be denied.

Respectfully submitted,

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